No. 3095

United States Circuit Court of Appeals

For the Ninth Circuit

LOST HILLS MINING COMPANY,
(a corporation), and
UNIVERSAL OIL COMPANY,
(a corporation),
Appellants,

vs.

THE UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANTS.

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Filed this.....day of February, A. D. 1918.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

TOWN TALK PRESS

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STATEMENT

This is an appeal from an order appointing a receiver of some oil lands in Kern County, California (Tr., p. 179). The property is described, in the amendment to the bill of complaint, as the northwest quarter and the southeast quarter of section 30; and the northeast quarter and the west half of section 32; in township 26 south, range 21 east, Mount Diablo Meridian, (Tr., p. 17).

The proceeding at bar is a suit in equity to quiet the title of the appellee, plaintiff below, to have it

adjudged that the defendants have no title to the property, and that the lands are the perfect property of the plaintiff free and clear of the claims of defendants, and to enjoin the defendants from committing any trespass or waste upon the lands (Tr., p. 12). As an incident to this ultimate relief, a receiver *pendente lite* was applied for (Tr., p. 13).

Courts of equity do not entertain suits for a receivership merely. A receivership is an incident in the exercise of a principal jurisdiction; it is something ancillary. If the court is without jurisdiction to hear and determine the main subject-matter, it is without power to appoint a receiver. (*Hutchinson v. American Palace Car Co.*, 104 Fed., 128; *Condon v. Mutual Life Assn.*, 89 Md. 99.)

To come closer to the bill of complaint (Tr., pp. 4-14). The presidential withdrawal of public lands from mineral exploration—covering an area inclusive of the land in suit—by the proclamation of September 27th, 1909, is alleged in the bill. It is said that notwithstanding the withdrawal, and "long subsequent to the 27th day of September, 1909, but not prior thereto," these defendants took possession of the lands in suit and explored them for petroleum and gas. Having said so much, and with special reference to the date of the withdrawal, the bill goes on to add, redundantly, that the defendants, at the time of the withdrawal, were

not *bona fide* occupants or claimants of the land, in diligent prosecution of discovery work; nor did they continue, once they did begin, in the diligent prosecution of such work. The plain English of it is that they invaded this land after it had been withdrawn—they were trespassers, and that is the epithet, precisely, which the bill, in paragraph 9, tags them with.

It is next said that the defendants made an oil discovery on July 29th, 1910, and have since drilled numerous wells, to plaintiff's damage, and are now trespassing upon the lands, and committing waste. It may be just as well to quote here what the bill says in so many words: (Par. IX):

> "Said defendants, Lost Hills Mining Company and Universal Oil Company, hereinbefore alleged to have entered upon said lands, are now unlawfully extracting oil and gas from said lands, drilling oil and gas wells thereon, and *otherwise trespassing* upon said lands and asserting claims thereto, and are threatening to, and will, unless restrained by the order of this court, continue to unlawfully extract oil and gas from said lands, and to drill oil and gas wells thereon, and operate same, and extract, convert and appropriate, use, sell and dispose of oil and gas from said lands, and *otherwise trespass* upon said lands and commit waste thereon to the great and irreparable damage of plaintiff and to the great and irreparable injury to said lands, and contrary to, and by infringement upon, the general governmental policy adopted and declared by the United

> States for the protection and conservation, use, and disposal, of the petroleum and gas in said lands and in other lands belonging to the United States."

So much for the bill of complaint: not a word in it, be it noted, about any proceedings in the Land Department.

But the answer and the proofs reveal that this is no mere case of trespass upon public lands, as was the El Doro case, 229 Fed. 946, which went off upon the sufficiency of a complaint framed very much like the present one. The answer and the proofs reveal that this is the precise case of a mineral application, now pending in the Land Department, and of which the Land Department is now in the actual exercise of jurisdiction.

The answer first joins issue on the averments of the complaint (Tr., pp. 19-33). By way of a further and affirmative defense, the answer gives the history of the property. The defendants and their grantors, it is said, located these lands on February 14th, 1907, as mining claims, pursuant to the statutes of the United States. They have held and worked the lands ever since. In 1908 they made a discovery of gypsum, and they have continuously and uninterruptedly and industriously worked and developed these lands in the development and production of oil and gas (Tr., pp. 33-4), and the bill, itself, alleged a discovery of oil on

July 29, 1910, (Tr., p. 7); while the answer alleges such discovery as of a time long prior to this date (Tr., p. 27).

Challenging the jurisdiction of the court in terms (Tr., p. 35), the answer sets forth the location of the northwest quarter of section 30, the recordation of the notice of location, and the assignment by the locators to the Lost Hills Mining Company (Tr., pp. 36-7). It alleges the occupancy of the property, the assessment work, the diligent prosecution of work leading to and resulting in the discovery of oil, also the discovery of gypsum; $5,000 being expended in developing the oil, and $600 in developing the gypsum (Tr., pp. 38-9). The status of the company as a *bona fide* occupant within the Pickett Act is alleged.

We are now brought to the application for patent and to the jurisdiction of the Land Department. On November 18, 1911, it is said, and long prior to the beginning of this suit, the Lost Hills Mining Company filed its application for a patent on this quarter section, in the United States Land Office at Visalia—"wherein and whereby it did apply to the United States of America, and to the general land department thereof, in accordance with the laws of the United States of America and the regulations of the Department of the Interior" (Tr., pp. 39-40).

The statutory proceedings and requirements in the way of a showing to the Land Office, and of sup-

porting affidavits, are set forth with particularity (Tr., pp. 40-46). The publication and posting of notice, and the proofs in that behalf, are made to appear (Tr., pp. 46-8). The payment of the purchase price, the issuance of the receiver's receipt, and the forwarding of a duplicate receipt, with the record in the matter of such application, to the General Land Office, and the statement that the proceedings ever since have been and now are pending before the Commissioner of the General Land Office—all this is alleged (Tr., pp. 48-50).

A similar showing is made in the answer, touching the southeast quarter of section 30, the northeast quarter of section 32, the northwest quarter of section 32, and the southwest quarter of section 32.

The answer also speaks of the southeast quarter of section 32, which is not involved in the amended description of the lands in suit. It is said that the Lost Hills Mining Company applied for a patent on this quarter section, on December 2d, 1911, in due form, that the Commissioner of the General Land Office, on November 29, 1915, clear-listed the application, and that, pursuant to such clear-listing, the patent was issued to the company (Tr., p. 104). In clear-listing this application, the Commissioner found that the locations of each of the other quarter sections involved in the present suit

were made regularly and in good faith (Tr., pp. 104-5).

But it also appears from the proofs (Tr., pp. 468 *et seq.*) that after the purchase of the quarter sections described in the bill, had been duly completed in the local land office, the receiver's receipt issued, and the papers transmitted to the General Land Office, the Commissioner directed the local land office, on charges filed by a mineral inspector, to proceed, after notice, with the hearing of such charges. These charges go upon the very thing alleged against these entries in the bill, namely: that the applicant was not in diligent prosecution of work leading to discovery of oil or gas at the date of the withdrawal. There is no reference in the bill of complaint to gypsum. But the answer alleges, as well, a discovery of gypsum as of oil,—in this respect, following the application for patent. The charges pending in the Land Department go also to this matter of gypsum, and allege that the claim of a gypsum discovery is a subterfuge for obtaining title to land chiefly valuable for oil. In a word, the Land Department has now before it—and evidence has been taken to a considerable extent—the very question upon which this bill turns—our diligent prosecution, that is to say, of work leading to the discovery of oil; and an additional question, not raised by the bill, touching the sufficiency of this gypsum discovery. There are two proceedings,

parallel and concurrent, going on *pari passu*, the proceeding now before the court on this bill and answer, and the proceeding pending and on trial in the Land Department, in both of which the same issue is awaiting and undergoing trial, and in both of which the ultimate relief is the decision, one way or the other, on the matter of the title to the property. Can such things be? Has the jurisdiction been committed to both tribunals? Is it a race of diligence, seemly or unseemly, for the first and faster determination? This is one of the questions presented by this record.

If the jurisdiction should be held to be in the Land Department, then the court is without that primary jurisdiction to which is drawn and upon which is rested, its auxiliary and incidental jurisdiction to appoint a receiver. Judge Bean held that he had this primary jurisdiction, with its incidental power to appoint a receiver. But he went on to say, that if he was wrong about that, he would be authorized to appoint a receiver pending the determination of the proceedings in the Land Department. His thought was, that the Land Department had no equity powers of injunction or receivership, and that the court would be justified, as an incident and an aid to the jurisdiction of the Department, in appointing a receiver pending a determination by the Department. The conclusive answer, it is believed,

is, that the bill in this case is not framed on any such theory.

ASSIGNMENT OF ERROR

The assignments of error are really gathered up in the two questions which have just been suggested: First, did the court have jurisdiction to adjudicate the title to the property, while that very question was pending in the Land Department on an application for patent? And, second, did the court have jurisdiction to appoint a receiver, in aid of the proceedings in the Land Department, upon a bill framed like the bill in the present case? We proceed at once to the argument of these questions:

ARGUMENT:

I.

The Court had no general or primary jurisdiction to adjudicate the title to this property, while that very question was pending in the Land Department on an application for patent.

It is conceded by Judge Bean that if this were a contest between private parties, the payment of the purchase price would vest the equitable title in the applicant, with a *prima facie* right to a patent. He says:

> "In a contest between private parties over the title or right to the possession of mining

> property for which patent has not been issued, the doctrine invoked would no doubt be applicable."

He is referring to the doctrine that the payment of the purchase price "was in effect a judgment *in rem*, and vested the equitable title to the land in the defendants, subject only to the appellate jurisdiction of the land department." He goes on:

> "Where the necessary steps are taken by a qualified applicant to obtain a patent to mining land, and no adverse claim has been filed, the applicant becomes vested with the equitable title and a *prima facie* right to a patent immediately upon the payment of the purchase price, and the delay of the Department in issuing patent does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." He cites *Benson Mining Company v. Alta Mining Company*, 145 U. S. 428; also the case of *El Paso Brick Company v. McKnight*, 233 U. S. 250, referred to by this court in its recent opinion in *Consolidated Mutual Oil Co. v. United States*, No. 2787.
>
> "But," continues Judge Bean, "such a proceeding does not divest the government of its title, nor is it an adjudication as between the claimant and the government." (Decision below, 236 Fed., p. 975.)

It is believed, with deference, that the learned judge fell into error. The proceeding does, it is submitted, divest the government of the equitable title, subject always, until patent issues, to the un-

spent jurisdiction of the Department by appellate proceedings within the Department itself, to re-examine, and, if need be, to annul the entry. The very case cited by Judge Bean, *Benson Mining Company v. Alta Mining Company*, 145 U. S. 428, is clear to the point.

> "The equitable title," says Mr. Justice Brewer in that case, "accrues immediately upon purchase, for the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued."

And, further:

> "It is a general rule, in respect to the sales of real estate, that when a purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the land department of the government; and the ruling has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed, and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership."

And again:

> "There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser,

with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him."

Or, as was said by the Supreme Court of Wisconsin in *Cornelius v. Kessel*, 16 N. W. 550:

"The learned counsel for the plaintiff insisted there was a distinction between the case where the purchaser obtains a Register's final certificate, and where he merely holds the Receiver's receipt. But both instruments stand upon the same footing. *The purchaser's rights are founded on the contract of purchase and payment of money*, and the statutes of this State have always given the same effect to both instruments as evidence of title, and there is no earthly reason that we perceive for making a distinction between them, so far as the rights of the purchaser are concerned."

Cornelius v. Kessel went to the Supreme Court of the United States, 128 U. S. 456. The jurisdiction of the Land Department, by appellate procedings, to correct and annul entries of land allowed in the first instance by the register and receiver—precisely the jurisdiction now in exercise, in the case at bar, upon charges formally preferred—is fully sustained. It is said, at page 461 of the opinion:

"The power of supervision possessed by the Commissioner of the General Land Office over the acts of the register and receiver of the local land offices in the disposition of the public lands, *undoubtedly authorizes him to correct and annul entries of land allowed by them*, where the lands are not subject to entry, or the

> parties do not possess the qualifications required, or have previously entered all that the law permits. The exercise of this power is necessary to the due administration of the land department. If an investigation of the validity of such entries were required in the courts of law before they could be cancelled, the necessary delays attending the examination would greatly impair, if not destroy, the efficiency of the department. But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such *entry and payment* the purchaser secures a *vested interest* in the property *and a right to a patent* therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property."

If the government is not, as Judge Bean has put it, an adverse party, it is something very much more—it is a voluntary party, a vendor of real estate who retains the legal title as a trustee for the vendee in whom has been vested, by voluntary action of the vendor, the equitable title and estate.

In *Cosmos Exploration Co. v. Grey Eagle Oil Co.*, 104 Fed., p. 40, it appeared from the bills of complaint—as it appears here from the answer and proofs below—that the entries in question were being contested, "and that those contests are still

pending in the Land Department." Said Judge Ross:

> "No court can lawfully anticipate what the decision of the Land Department may be in respect to the contest, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact, such as is that relating to the character of any particular piece of land."

And in *Marquez v. Frisbie*, 101 U. S. p. 475, the court said:

> "That principle is, that the decision of the officers of the Land Department, made within the scope of their authority, on questions of this kind, is, in general, conclusive everywhere, except when considered by way of appeal *within* that department; and that, as to the facts on which their decision is based, in the absence of fraud or mistake, that decision is conclusive even in courts of justice, when the title *afterwards* comes in question. But in this class of cases, as in all others, there exists in the courts of equity, the jurisdiction to correct mistakes, to relieve against frauds and impositions, and in cases where it is clear that these officers have, by a mistake of the law, given to one man the land which, on the undisputed facts, belonged to another, to give appropriate relief."

Citing *Moore v. Robbins*, 96 U. S. 530, *Shepley v. Cowan*, 91 U. S. 330, and *Johnson v. Towsley*, 13 Wall., 72,—all three of them were cases where the patent had issued, the jurisdiction of the Department had been spent, and thereupon the jurisdiction of the courts attached.

As Mr. Justice Brewer aptly expressed it, in speaking of canceled entries of timber lands:

> "The statute provides that if an entry is wrongfully made it may, *prior to patent*, be set aside by the Land Department, the entryman forfeiting the money which he has paid. In other words, *by the action of the department, the equitable title is canceled and restored to the government.*" (*U. S. v. Detroit Lumber Co.*, 200 U. S. p. 339.)

> "It is clear," said the Supreme Court of the United States in *U. S. v. Schurz*, 102 U. S. p. 401, "that the right and the duty of deciding all such questions belong to those officers (of the Land Department), and the statutes have provided for *original* and *appellate* hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction."

Here, then, is a case in which the entry had been made, the purchase price paid, the receiver's receipt issued, and the equitable title vested. That equitable title was questioned by charges preferred within the Department, presenting a question peculiarly of departmental cognizance—the question of the diligent prosecution of work leading to the discovery of oil, as of the date of the presidential withdrawal. It was this question precisely upon which the bill of complaint is made to turn. The two controversies, investigating the same question, are going on concurrently; indeed, the controversy

is not only depending as well in the Land Department as in the court, but it has been partially tried, evidence has been introduced to a substantial extent, before the Department. As Judge Ross said in *Cosmos Exploration Co. v. Grey Eagle Oil Co., supra*, "no court can lawfully anticipate what the decision of the land department may be in respect to the contest, nor direct in advance what its decision should be, even in matters of law, much less in respect to matters of fact."

Judge Bean, it is true, in the opinion below, refers to some decisions of the Supreme Court. But they are all cases in which the patent had issued, the jurisdiction of the Department had been exercised and exhausted. He cites no case where the Department, on an appellate proceeding within the Department, is exercising its jurisdiction to review and annul an entry allowed, in the first instance, by the local land office, and where at the same time the jurisdiction of a court has been sustained, prior to patent, to review and annul that same entry upon a consideration of the precise question which the Department is hearing and determining. No such case, it is believed, could be cited, for no such decision can be found.

It is submitted, therefore, that the court below had no general or primary jurisdiction to adjudicate the title to this property, while that very question was being heard and determined in the

Land Department on an application for patent. So far, then, as the order appointing a receiver is to be sustained as an incident to a general or primary jurisdiction which does not exist, it must fail.

II.

The bill in this case was not framed to invoke the aid of the court in protecting the property pending final disposition of the patent application by the Land Department—it ignores the proceedings in the Department—and it does not afford a basis for the appointment, in that view, of a receiver.

It is said by Judge Bean, in his opinion below:

> "If, however, I am mistaken as to the extent of the jurisdiction, the government is clearly entitled, upon the allegations of the bill and the showing made, to invoke the aid of a court of equity to protect the property from waste and destruction pending the final determination of its rights therein the Land Department."

He then calls attention to the government's claim that the discovery of gypsum was merely a subterfuge, and that there was an accommodation location, not in the case at bar, but in another case, tried at the same time, and known as the Devils Den case. He makes no finding as to whether the government has made out these charges by a preponderance of evidence. Indeed he declines to express an

opinion, and will only go so far ts to say that there is substantial ground for the government's position. But he is silent as to the main question in the case now being argued, the Lost Hills case, number A-52. That question was, whether the company had the status of explorer, within the Pickett Act, by force of its diligent prosecution of work leading to the discovery of oil. And there was no imputation whatever, in the present case, as to the regularity and *bona fides* of the location.

Now, then, the bill in this case does not ask for any protective relief, for an injunction or a receiver, until the decision of the Land Department upon the matters pending therein. It ignores those proceedings. It recites in paragraph X (Tr., p. 9) that the defendants claim some right in the land, "derived directly or mediately from some pretended *notice or notices* of mining locations, or *otherwise*, and by conveyances, contracts or liens directly or mediately from the persons by whom such pretended *locations* are claimed to have been made; but none of such location notices and claims is valid against this plaintiff, and no rights have accrued to the defendants or any of them thereunder, either directly or mediately." As already pointed out, in the statement of the case, the allegation of the bill is that the defendants entered upon and took possession of the land "long subsequent to the 27th of September, 1909, but not prior thereto" (Tr., p.

6); these defendants are described in this bill as trespassers (Tr., p. 9); and it is prayed that they be enjoined from committing any trespass or waste upon the land (Tr., p. 13).

Not a word beyond a pretended notice of location; not a word beyond a trespass alleged to have begun long after the date of the withdrawal. Not a syllable about any application for patent, or about the notice thereof, or the payment of the purchase price, or the issuance of the receiver's receipt; not a syllable about the pendency of these very charges, or of any proceeding whatever in the Land Department. Those proceedings are ignored.

In *Cosmos Co. v. Grey Eagle Co.*, 190 U. S. 302, the question of title, depending though it was, as here, in the Land Department, was brought into the federal court, on the equity side, for adjudication and determination; and as incidental to the general jurisdiction thus ascribed to the court, an injunction and receiver were asked for. The Supreme Court, at the threshold of its opinion, (p. 308) observes:

> "The court is therefore called upon, in advance of and without reference to the action of the land department, to determine complainant's right and title to the three-quarters interest in the selected land, and a final decree is asked determining the interest of the parties in this land, *while the question in relation to title is still properly before the land department and not yet decided.* This we cannot do."

And further (p. 308):

> "An examination of the complainant's bill shows that it does not ask for an injunction *until the decision of the land department upon the matters pending therein. The complainant ignores those proceedings*, so far as to claim now the final adjudication by the court based upon its alleged equitable title to a three-quarters interest in the land selected."

And again (p. 315):

> "The bill is not based upon any alleged power of the courts to prevent the taking out of mineral from the land, *pending the decision of the land department upon the rights of complainant*, and the court has not been asked by any averments in the bill or in the prayer for relief to consider *that question*."

Indeed, Judge Bean himself in one of his more recent decisions (*U. S. v. Record Oil Co. et al.*, No. A-41), in dismissing a bill, remarked:

> "It is claimed, also, that in any event the plaintiff is entitled to invoke the aid of a court of equity to protect the property from waste and destruction pending final disposition of the patent application by the land department. But the *bills* are not framed on that theory, and *contain no allegation* upon which such a decree could be based."

It is now, therefore, respectfully submitted that the order appointing a receiver should be reversed.

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